In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. [redacted] 185

Office Supreme Court, U.
FILED
MAY 31 1969
JOHN F. DAVIS, CLERK

[redacted]

Appellants,

-vs-

[redacted]

Appellees.

Appeal from the United States District Court
for the District of Alaska

STATEMENT AS TO JURISDICTION

G. KENT EDWARDS,
Attorney General of the State of Alaska,

ROBERT L. HARTIG,
Assistant Attorney General of the State of Alaska,
Pouch K, Capitol Building,
Juneau, Alaska 99801.

Attorneys for Appellees.

[redacted] PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions presented	8
Statement of the case	12
The questions presented are substantial	17
A. The Federal Constitutions' Question	17
B. The Question as to Whether There is an Actual Controversy Between the Parties Which Should be the Subject of Declaratory Relief	18
C. Dismissal of Appellees' Action by the United States District Court or Abatement of the Action Pending Determination of the State Constitutional Issues by the Alaska State Court System	19
D. The Granting of Appellees' Motion for Summary Judgment	21
Conclusion	23

CITATIONS

Cases

	Pages
Alabama Public Service Commission v. Southern Railroad Company, 341 U.S. 341 (1951)	20
Florida Lime and Avacado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1959)	4
Horner v. United States, 143 U.S. 570 (1892)	23
Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61 (1911)	17
McGowan v. Maryland, 366 U.S. 420 (1961)	17
Morey v. Doud, 354 U.S. 457 (1957)	17
Muskrat v. United States, 219 U.S. 246 (1910)	19
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)	20
Siler v. Louisville & Nashville Railroad Company, 213 U.S. 175 (1909)	21, 23
Sterling v. Constantine, 207 U.S. 378 (1932)	23
United Public Workers of America v. Mitchell, 330 U.S. 75 (1947)	19
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955)	17

Statutes

28 U.S.C., Sec. 1253	3
28 U.S.C., Sec. 2101(a)	3
28 U.S.C., Sec. 2201	18

Rules

F.R.C.P. 56(e)	22

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska.

Appellants,

-vs-

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE

Appellees,

Appeal from the United States District Court for the District of Alaska

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a

direct appeal to review the final decree granting appellees' Motion for Summary Judgment and a Permanent Injunction denying appellants' motion to dismiss or in the alternative to abate, and denying appellants' motion for summary judgment, and to exercise jurisdiction in this case.

OPINION BELOW

The District Court delivered a written opinion, a copy of which is attached to this Jurisdictional Statement. The District Court made no findings of fact and conclusions of law on the basis that they are not required when a disposition is made upon summary judgment, Federal Rule of Civil Procedure 52(a). The District Court filed its opinion on February 26, 1969 and entered the decree in question on the 20th day of March, 1969, a copy of which is attached to this Jurisdictional Statement.

JURISDICTION

The appeal herein is from a final decree made and entered by the United States District Court for the District of Alaska, specially constituted as a District Court of three judges pursuant to the provisions of 28 U.S.C. Sec. 2284, upon the appellees' application for a temporary and permanent injunction to restrain the enforcement, operation or execution of the statute of the State of Alaska, to wit, Chapter 186, Session Laws of Alaska 1968 (hereinafter referred to as Ch. 186, SLA 1968), also known as Sections 16.05.536,

16.05.540 and 16.05.250 of Alaska Statutes, as amended by Ch. 186, Laws of Alaska 1968. Appellees alleged that Ch. 186, SLA 1968 was repugnant to the Equal Protection clause and the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and repugnant to Art. VIII, Sec. 15 of the Alaska Constitution which prohibits the creation of an exclusive fishery and Art. I, Sec. 1 of the Alaska Constitution which guarantees to all persons equal protection under the law, and Art. I, Sec. 7 of the Alaska Constitution which provides that no person shall be deprived of life, liberty or property without due process of law and Art. VIII, Sec. 3 of the Alaska Constitution which reserves all fish, wildlife and waters to the people for the common use, and Art. VIII, Sec. 17 of the Alaska Constitution which provides that laws and regulations governing the use of natural resources shall apply equally to all persons similarly situated. Similar claims were made in respect to section 102.09 of the 1969 Alaska Commercial Fishing Regulations.

The final decree appealed from was made and entered on March 20, 1968. Notice of appeal was filed in the United States District Court for the District of Alaska on April 3, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C., Sections 1253 and 2101(a). The following decision is believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this

case. *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1959).

The statute of the State of Alaska that is involved is Ch. 186, Alaska Statutes 1968, which provides as follows:

Section 1. Legislative findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons Eligible For Gear Licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of the three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on Issuance of Fishing Gear Licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area

in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

The regulation of the State of Alaska that is involved in Sec. 102.09 of the 1969 Commercial Fishing Regulations for the State of Alaska. That regulation provides in part as follows:

Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship: Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death; If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource.

The District Court held the statute and regulation in question to be unconstitutional under the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States and Sec. 3, Article VIII of the Alaska Constitution, which reserves fish and in their natural state to the people for com-

mon use and Sec. 15, Article VIII of the Alaska Constitution which prohibits the granting of an exclusive right of fishery.

The District Court also denied appellants' motion that the three Judge Court abstain from consideration of the State constitutional issues until the Alaska State Courts should decide the Alaska constitutional issues.

QUESTIONS PRESENTED

1. Do the statutory and regulatory provisions separately or taken together violate the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States?

Ch. 186, SLA 1968 insofar as its provisions are pertinent to this action, may be summarized as follows:

(a) Section 1 of the Act contains legislative findings to the effect that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear, creating difficulties in conserving and managing the resource; and that the uninhibited issuance of gear licenses to anyone notwithstanding the lack of experience of the licensee has been the prime factor tending toward accumulation of excessive gear and has posed management, enforcement and public safty problems in Alaska's salmon fishing waters.

(b) Section 2 of the Act provides that a salmon net gear license for a specific salmon registration area

may be issued only to a person who has previously held a salmon net gear license for the specific area or who has for any three years held a commercial fishing license, and while so licensed actively engaged in commercial fishing in the specific area. There are 12 salmon registration areas in the State of Alaska.

(c) Section 4 of the Act permits the Board of Fish and Game of the State of Alaska to establish additional qualifications relating to the eligibility requirements necessary for the issuance of salmon net gear licenses.

Section 102.09 of the 1969 Commercial Fishing Regulations for the State of Alaska provides that a person would be eligible for a salmon net gear license in a specific area if he had held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area or had for any three years since January 31, 1960 held a commercial fishing license and while still licensed actively engaged in commercial fishing in that specific salmon registration area.

2. Whether the District Court properly denied appellants' motion to dismiss or in the alternative to abate.

Section 3, Article VIII of the Alaska Constitution provides as follows:

> "Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, Sec. 15 of the Alaska Constitution provides as follows:

> "No Exclusive Right of Fishery. No exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the state."

Appellees alleged that the statutory and regulatory provisions here in question violated the quoted State constitutional provisions. On September 16, 1968, defendants filed a motion to dismiss the action, or in the alternative to stay the proceedings pending the determination by the Alaska Court System of the constitutionality of the statutes and regulation in question in the light of the above quoted Alaska constitutional provisions. In its decree herein filed March 20, 1969, the District Court denied defendants' motion to dismiss or in the alternative to stay proceedings pending the determination of the State constitutional issues by the Alaska Court System.

3. Are Ch. 186, SLA 1968 and Section 102.09 of the 1969 Commercial Fishing Regulations of the State of Alaska unconstitutional under the foregoing quoted provisions of the Alaska State Constitution?

4. Did the District Court grant appellees' motion for summary judgment upon facts not properly before it?

In its opinion filed on February 26, 1969, at page 5, line 10, the District Court states:

> "An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net gear to catch salmon. Thus, if an outsider wishes

> to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area."

The Court further stated at page 5, line 23:

> "Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire."

The opinion and the facts recited therein constituted the basis upon which the District Court granted appellees' motion for summary judgment. The facts upon which the above quoted statements depend were not contained in the affidavits, answers to interrogatories, or other evidentiary documents before the Court.

5. Was appellees' motion for summary judgment granted despite the existence of genuine issues as to material facts?

6. Are appellees entitled to summary judgment as a matter of law?

7. Did the District Court grant appellees' motion for summary judgment in accordance with Rule 56, Federal Rules of Civil Procedure?

8. Did appellees fully comply with Rule 56, Federal Rules of Civil Procedure?

9. Should appellants be permanently enjoined and restrained from taking any action to place into effect, to continue into effect, or otherwise invoke or enforce Sec. 102.09 of the Alaska Commercial Fishing Regulations, 1969 and Ch. 186, Session Laws of Alaska 1968?

10. Did the District Court properly deny appellants' motion for summary judgment?

STATEMENT OF THE CASE

The Fifth Legislature of the State of Alaska, Second Session, passed in 1968 Ch. 186, Session Laws of Alaska, 1968. The text of the statute is attached to this Jurisdictional Statement. In 1968 the Board of Fish and Game of the State of Alaska promulgated Sec. 102.09 of the 1968 Commercial Fishing Regulations relating to salmon net gear licenses. On July 5, 1968, appellees, nonresidents of the State of Alaska, and previous holders of salmon net gear commercial licenses, filed their complaint herein. The complaint was based in large part upon the existence of Sec. 102.09, 1968 Commercial Fishing Regulations relative to salmon net gear of the State of Alaska. Because of the lapse of time during the pendency of this action, a substantial portion of the matters alleged in appellees' complaint became moot and are not relevant to this appeal. On January 6, 1969, appellees moved for relief to file an amended complaint. The appellants stipulated that the amended complaint could be filed upon compliance with certain conditions. On February

14, 1969, the Court allowed the filing of appellees' amended complaint. Insofar as pertinent to this appeal the amended complaint alleged that the appellees had applied for a 1968 license authorizing their operation of salmon net gear for commercial fishing in Alaskan waters and that the application for such licenses had been denied. Appellees alleged further that because of the operation of Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1969 Commercial Salmon Fishing Regulations of the State of Alaska, they could not qualify for salmon net gear licenses. Appellees further alleged in their complaint that as a result of the statutory and regulatory provisions relative to the issuance of a State of Alaska commercial salmon net gear license, they were deprived of equal protection of the laws under Sec. 1, Article IV of the Amendments of the Constitution of the United States of America, and further that they were denied rights provided them by Article VIII, Sec. 15 and Article VIII, Sec. 3 of the Constitution of the State of Alaska.

In support of matters alleged in the complaint and also in support of appellees' motion for summary judgment filed on December 2, 1968, Rudolph Plancich, one of the appellees, filed a supplemental affidavit on January 20, 1969. The supplemental affidavit of Rudolph Plancich stated that he was the owner of a purse seine fishing vessel representing an investment of approximately $45,000.00 and desired to obtain an Alaska commercial purse seine gear license for 1969 for use in Southeast Alaska. He was denied issuance

for such license in 1968. The affidavit further stated that because of the application of Ch. 186, SLA 1968 and Sec. 102.09 of the Alaska 1969 Commercial Fishing Regulations, that he would not be eligible for issuance of a net gear license in Southeast Alaska in 1969.

The affidavit stated also that as a result of affiant's inability to obtain a salmon gear license for fishing operations in the Southeast Alaska waters in 1969, he would suffer losses in the amount of $10,000.00 to $20,000.00 and that these losses would continue during each year he was denied the issuance of the license.

On September 16, 1968, appellants filed a motion to dismiss, or in the alternative, to stay the proceedings in the United States District Court pending the determination by the Alaska State Court System of issues involving Alaska constitutional law. The specific issues of Alaska constitutional law which appellants urged as proper for determination by the Alaska State Court System were the effect of Article VIII, Sections 3 and 15 of the Alaska State Constitution. The United States District Court set the time for hearing on appellants' motion to dismiss, or in the alternative, to abate and on all motions presently pending. The time for hearing was continued until February 14, 1969, at which time all motions then pending were heard by the Court.

On November 6, 1968 appellants filed a motion for summary judgment and suggestion of mootness. The appellants urged that Sec. 102.09 of the 1968 Commercial Fishing Regulations of the State of Alaska were as of the date of the motion, November 6, 1968,

of no further force and effect. The motion for summary judgment was based upon the fact that there was no actual controversy between the parties relative to the applicability or constitutionality of Ch. 186, SLA 1968. Appellants asserted that as of the date of the motion, appellees had not applied for and consequently had not been denied, salmon net gear licenses for 1969. Ch. 186, SLA 1968 governed the issuance of salmon net gear licenses only for 1969 and subsequent years. The issuance of the 1969 licenses was governed in part by regulations to be enacted by the Alaska State Board of Fish and Game subsequent to the date of the motion. The motion for summary judgment was supplemented by the affidavit of Augie Reetz, Commissioner of the Alaska Department of Fish and Game, to the effect that none of the appellees had filed applications for issuance of 1969 commercial salmon net gear licenses for the State of Alaska and that the 1968 commercial salmon net gear fishing regulations for the State of Alaska were no longer in force and effect. The affidavit further stated that the regulations of the Alaska Board of Fish and Game governing the issuance of 1969 commercial salmon net gear licenses had not yet been enacted.

On February 14, 1969, the matters raised in appellants' motion for summary judgment were heard. The decree filed March 20, 1969, denied appellants' motion for summary judgment, and denied appellants' motion to dismiss or abate.

On December 2, 1968 appellees filed a motion for summary judgment on the basis that as a matter of

law the statutory and regulatory provisions relative to the issuance of Alaska commercial salmon net gear fishing licenses deprived appellees, among other things, of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and rights granted by Article VIII, Secs. 3 and 15 of the Alaska Constitution. Appellees' motion for summary judgment was heard on February 14, 1969 and granted by the decree of the District Court filed March 20, 1969.

The decree of the Court filed March 20, 1969 ordered as follows:

1. That appellants' motion to dismiss and motion for summary judgment be and the same are denied.

2. Appellees' motion for summary judgment be and the same is hereby granted.

3. Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1968 Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska.

4. That appellants, their successors in office and all persons acting as their agents, officers and servants or under their direction and authority be and they are permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce part 102.09 of the Alaska Salmon Commercial Fishing Regulations in the aforesaid Ch. 186, Session Laws of Alaska 1968, and from denying fishing gear licenses by reason of the authority thereof.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Federal Constitutional Question.

The District Court has held that Ch. 186, SLA 1968 and Sec. 102.09 of the 1969 Commercial Salmon Net Gear Fishing Regulations of the State of Alaska deprive appellants of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. At the outset it must be noted that the State of Alaska is attempting to regulate by the contested statutory and regulatory provisions the manner in which one of its important natural resources, salmon, may be harvested.

When a State is found to have violated the Federal Constitution in an attempt to regulate, manage, and conserve one of its important resources, the constitutional issue presented must of necessity be substantial. This fact is particularly underscored in the present case where the legislative findings upon which the provisions of Ch. 186, SLA 1968 are based are to the effect that the accumulation of excessive salmon net gear has posed management, enforcement and public safety problems in particular salmon fishing areas. The Supreme Court of the United States has decided numerous cases involving the applicability of the Equal Protection clause of the Fourteenth Amendment to state regulation, *Morey v. Doud,* 354 U.S. 457 (1957), *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955), *McGowan v. Maryland,* 366 U.S. 420 (1961). The Supreme Court, in taking cases such as those named under considera-

tion, has determined that matters involving the application of the Equal Protection clause of the Fourteenth Amendment to state regulatory statutes involved substantial federal issues. The substantiality of the federal question is made clear by the fact that none of the above cited cases relate directly to the power of a state to regulate entry into its commercial fishing industry.

The State of Alaska asserts that the classification created by the statutory and regulatory scheme is reasonable in the light of the State's objective of insuring conservation and management of its salmon fishing resources. It is of crucial importance that the State of Alaska have the United States Supreme Court determine the validity of its approach in this matter.

B. The Question as to Whether There is an Actual Controversy Between the Parties Which Should be the Subject of Declaratory Relief.

Appellees brought their action asking for declaratory relief under the provisions of 28 U.S.C. Sec. 2201. That section states that

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought."

The authority of the United States District Court to decide the issues presented to it depends upon the

existence of an actual controversy between the parties. Appellants asserted in the District Court that there was no actual controversy between the parties and that therefore appellees' action should be dismissed. The United States Supreme Court has decided, cases involving the question as to whether or not there was an actual case in controversy between the parties, *Muskrat v. United States,* 219 U.S. 246 (1910), *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1947). It is the proper function of the United States Supreme Court to determine and insure that United States District Courts decide cases which are only properly before those courts. Thus, it is a substantial federal question whether or not the District Court has properly exercised its jurisdiction and authority in these cases. Appellants assert that in this case the United States District Court did not properly have before it a case involving an actual controversy between the parties. The matter should therefore be resolved and decided by the United States Supreme Court.

C. Dismissal of Appellees' Action by the United States District Court or Abatement of the Action Pending Determination of the State Constitutional Issues by the Alaska State Court System.

As noted earlier, appellees, in addition to alleging that the statutory and regulatory provisions involved in this action violated the Fourteenth Amendment of the United States Constitution, alleged that the same provisions violated certain constitutional provisions of the State of Alaska. Appellants filed a motion that appellees' action be dismissed, or in the alternative

abated until such time as the Alaska State Court System had an opportunity to pass on the State constitutional issues. Appellants felt that such a determination was necessary in that the issues raised by appellees were a matter of first impression in respect to the Alaska State constitutional provisions. The United States District Court denied appellants' motion to dismiss or abate and, in addition to its ruling that the statutory and regulatory provisions here in question violated the Federal Constitution, specifically ruled that the statutory and regulatory provisions violated Sections 3 and 15 of Article VIII of the Alaska State Constitution. See pages 9-10 herein for the text of those provisions. Appellants' motion to abate was based on the federal doctrine of abstention as set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). It must be noted that in deciding the issue presented in the *Pullman Co.* case, the Supreme Court must, of necessity, have noted that a substantial federal question was presented when the issue of the application of the doctrine of abstention is involved. See also *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951). The importance of the question presented is further underscored when it is considered that unless the United States Supreme Court considers this particular issue, appellants are deprived of any appeal relative to the application of the doctrine of abstention and relative to the determination of the State constitutional issues. The applicability of Sections 3 and 15 of Article VIII of the Alaska State Constitution to the statutory and regulatory

provisions in question herein was first raised before the three-man United States District Court. The United States District Court ruled that the Alaska statutory and regulatory provisions violated the quoted Alaska constitutional sections. Unless the United States Supreme Court assumes jurisdiction to decide whether or not appellants' motion to abate was properly denied, the decision of the United States District Court must forever remain unassailable. Thus, an important question as to the relationship between the State Court System and the Federal Court System is involved. The existence of the question and the context in which it is represented raises a substantial federal question which must be determined by the United States Supreme Court.

In the event that the United States Supreme Court should determine that the District Court properly denied appellants' motion to abate, the Supreme Court should then decide upon the applicability of Sections 3 and 15 of Article VIII of the Alaska Constitution to the statutory and regulartory provisions here in question. Only in this manner may the determination of the District Court on this point be reviewed by an appellate court. The United States Supreme Court has jurisdiction to review this aspect of the decision, *Siler v. Louisville and Nashville Railroad Co.*, 213 U.S. 175 (1909).

D. The Granting of Appellees' Motion for Summary Judgment.

The final decree in this case was based upon a hearing on all of the motions presently pending before the

Court on February 14, 1969. One of those motions was appellees' motion for summary judgment which was granted. In granting appellees' motion for summary judgment the Court determined that the statutory and regulatory provisions of the State of Alaska violated the Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. The Court based its decision upon the fact that "Under this scheme entry into the salmon fishing industry is controlled not by the State, but by local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (Opinion, Appendix page vii.) Appellants assert that the Court had no evidence before it whether in the form of affidavits, answers to interrogatories, or any other items which may be considered by a Court on summary judgment, upon which it could base the above quoted statement.

Federal Rule of Civil Procedure 56 provides the procedure with respect to summary judgment. Rule 56(e) sets forth the items which may be considered by the Court in a ruling upon the motion. The statement above quoted from the Court's opinion, upon which the Court heavily relied in granting appellees' motion for summary judgment, did not appear in the form of any document noted in Rule 56(e). Thus, a substantial federal question is presented for determination by this Court. The question presented is whether or not the United States District Court may consider matters not properly before it in order to

rule upon a motion for summary judgment. The matter is substantial because the issue goes to the heart of the practice upon which summary judgments would be granted or denied.

CONCLUSION

Since this case is one required to be heard by a District Court of three Judges, the Supreme Court has jurisdiction of the case on appeal, and that jurisdiction extends to every question involved in the case, *Sterling v. Constantine,* 287 U.S. 378, 393, 394 (1932); *Siler v. Louisville and Nashville Railroad Co.,* 213 U.S. 175 (1909); and *Horner v. United States,* 143 U.S. 570, 576, (1892).

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1253, United States Code.

Dated this 27th day of May, 1969.

G. KENT EDWARDS,
Attorney General of the State of Alaska,
By ROBERT L. HARTIG,
Assistant Attorney General of the State of Alaska,
Attorneys for Appellees.

(Appendix Follows)

Appendix

In the United States District Court
for the District of Alaska

No. J-5-68

John Bozanich, et al.,
Plaintiffs,

vs.

Augie Reetz, Commissioner of Fish and Game for the State of Alaska, et al.,
Defendants.

Opinion

Before: Walter Ely, Circuit Judge, and Raymond E. Plummer and James A. Von Der Heydt, District Judges.

Ely, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted

a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word "gear," in its

---

[1]We set forth here the pertinent statute, chapter 186, S.L.A. 1968:

AN ACT

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be It Enacted by the Legislature of the State of Alaska:

• Section 1. Legislative Findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

• Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons Eligible for Gear Licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires

pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became effective on February 12, 1969[2]. From an examination of the germane provisions of the statute, quoted in the

---

to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

• Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on Issuance of Fishing Gear Licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

• Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

• Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968
Actual effective date: January 1, 1969

[2]We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license

margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitutions of the United States and the State of Alaska. There is no jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded

---

for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

on 28 U.S.C. § 1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281, 2284. On February 14, 1969, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow:

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues are moot. This contention is valid in its application to the plaintiffs' original complaint, which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing their salmon-catching equipment in certain coastal regions that they desire. Another three judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of

state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota,* 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). In *Zwickler,* the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privi-

lege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960[3]. An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

---

[3]Commercial Fishing Regulations, section 102.09(a)(1)(A), (B)(1969), note 2, *supra*. No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2) (1969), also quoted in note 2, *supra*. Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud,*[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79.

---

[4]354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provisions.'" [Citations omitted.]

354 U.S. at 463-64, citing other controlling authorities; *see Mayhue v. City of Plantation,* 375 F.24 447, 450-51 (5th Cir. 1967); *cf. Levy v. Louisiana,* 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required licenses. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing

by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character . . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights."

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority, in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Here, the Board has set specific years in the 1960's, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to

section 102.09, the forerunner of the section 102.09 regulations set out in footnote 2, *supra*.

The Alaska legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal

protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy, is required by Rule 5(H)(2)[6] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the defendants might offer proof that overriding considerations of conservation inspired the adoption of this challenged regulatory scheme. Such proof, whatever it might be, could not alter the result. However worthy or desirable may have been the motives behind the legislation, they cannot cure the obvious constitutional infirmities.

---

[6]This rule, as amended March 1, 1967, reads as follows:

"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

Accordingly, we deny the defendants' motions to dismiss and for summary judgment. We grant the plaintiffs' motion for summary judgment. The enforcement of the 1969 statute and the regulations in question is permanently enjoined. Plaintiffs' counsel will prepare and submit a proposed form of judgment.[6]

Dated this 26th day of February, 1969.

s/ Walter Ely
United States Circuit Judge

s/ Raymond E. Plummer
United States District Judge

s/ James A. von der Heydt
United States District Judge

Certified to be a true and correct
copy of original filed in my office.

Dated 2-26-69

J. M. Kroninger, Clerk
By s/ J. Meyer, Deputy

[6]Findings of fact and conclusions of law are not required when a disposition is made, such as here, by summary judgment. Fed. R. Civ. P. 52(a). Our opinion recites the essential factual and legal considerations which bear upon the result to which we have been impelled.

United States District Court
for the District of Alaska

No. J-5-68

John Bozanich, et al.,
Plaintiffs,
vs.
Augie Reetz, Commissioner of Fish and Game for the State of Alaska, et al.,
Defendants.

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 USCA §2281, et seq., on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Boochever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

It Is Ordered, Adjudged and Decreed as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

Dated this day of March, 1968.

Walter Ely
United States Circuit Judge

Raymond E. Plummer
United States District Judge

James A. von der Heydt
United States District Judge

Copy received
March 5, 1969
and approved as to form.
s/ Charles L. Cranston
Assistant Attorney General
of Attorneys for Defendants.

Filed February 26, 1969
U.S. District Court
District of Alaska